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INDEPENDENT RESEARCH GRADUATE PAPER
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Fourth Amendment Search and Seizure Violations in Employment Proceedings: Should the Merit System Protection Board (Board) use the "Reasonableness" Standard for Workplace Searches and Seizures set forth in United States v. O'Connor in Conjunction with Applying the Exclusionary Rule to Redress Violations or Should the Board Continue not Applying the Exclusionary Rule in accord with United States v. Janis?

I. INTRODUCTION

The Constitution of the United States, the basic legal framework Americans are taught to understand and treasure, embodies many freedoms they have come to cherish, particularly in the face of adversity or world crisis. The founding fathers, suffering great indignities imposed upon them by Great Britain, possessed keen insight, for they created a relatively simple document which has carried this nation for over two hundred years.

Although it lacks typical modern-day legalese, the Constitution and its Amendments have ever been the source of much interpretation and debate, scholarly and otherwise. This paper delves into Constitutional analyses with a goal of providing a clearer understanding of the Fifth and Fourth Amendments, with particular emphasis on the Fourth Amendment as it concerns federal employee workplace searches and seizures by supervisors or co-workers.

We begin with a historical overview of the Fifth Amendment, and its treatment and application, in both criminal and civil proceedings. Continuing with an in-depth historical analysis of the Fourth Amendment focusing on criminal law, we examine the judicially created exclusionary rule, its policy, history and application, and conclude assessing the interplay between the Fifth and Fourth Amendments.

The core of this paper examines the Fourth Amendment, specifically looking at two United States Supreme Court cases, United States v. O'Connor [1] and United States v. Janis,[2] as they relate to unreasonable searches and seizures within the federal workplace. We build upon those cases by analyzing application of the exclusionary rule in various state and federal employment settings, including two recent Merit Systems Protection

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[1] 480 U.S. 709 (1987).

[2] 428 U.S. 433 (1976).

Board (hereinafter, the Board) cases, and miscellaneous civil proceedings. We close that section of the paper with a two-fold purpose: ascertain whether the Board is utilizing law consistent with *Janis* or *O'Connor*, and determine whether either case and its respective Fourth Amendment principles satisfy constitutional safeguards.

Finally, this paper concludes by examining a suggested Board approach in three hypotheticals situations. The proposed Board approach combines *O'Connor's* test with unqualified extension of the exclusionary rule to Board proceedings, in intersovereign and intrasovereign scenarios. Under this standard, assuming the Board first found a constitutional violation using *O'Connor*, it would then apply the exclusionary rule to prevent the use of illegally seized evidence in federal removal proceedings. As we shall see, this approach is consistent with federal and state precedent.

II. FIFTH AMENDMENT--HISTORICAL BACKGROUND

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or Naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, *nor shall be compelled in any criminal case to be a witness against himself* (Italics added), nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use without just compensation.

A clear understanding of the Fourth Amendment of the United States Constitution should begin with analysis of the Fifth Amendment. Looking at each amendment simultaneously, it becomes apparent the founding fathers exercised extreme skill and care in drafting them. The search for the true meaning of the Fifth and Fourth Amendments has spawned volumes of caselaw and other legal periodicals. There can be little doubt of the impact of both Amendments upon our society, and, in particular, as they relate to administration of our criminal justice system.

The italicized portion of the Fifth Amendment noted above is a specific guarantee, preventing a sovereign from using compelled self-incriminating testimony in a criminal proceeding. Despite the amendment's apparent clarity, questions continue to remain as to its breath and scope, no less so than in the federal labor employment setting. For a better understanding of the Fifth Amendment's application in federal employment law, we should examine its application in federal criminal law.

In general, in the area of federal criminal law, the Fifth Amendment forbids the Federal Government and its agents through which it acts--courts, grand-juries, prosecutors, marshals and other officers, from using physical torture, psychological pressure, threats of fines, imprisonment or prosecution, or other governmental pressure to force a person to testify against himself. If the federal government extracts incriminating testimony, the judicial remedy is suppression of the evidence, including any fruit gathered as a result. Although it seems self evident today, this issue was unsettled for many years.[3]

There are some who believe the law should be as was stated by Mr. Justice Black in his dissent, Irvine v. California,[4] which propounded the Fifth Amendment forbids all federal agents, legislative, executive and judicial, from forcing a person to confess a crime; forbids use of a federally coerced confession in any court, state or federal; and forbids all federal courts from using a confession which a person was compelled to make against his will. Mr. Justice Black further explained the amendment plainly prohibits all federal agencies from using their power to force self-incriminating testimony, and, since the Amendment is the supreme law of the land, binding on all American judges, use of

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[3] *See e.g.* United States v. Boyd, 116 U.S. 616 (1886); Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[4] Irvine v. California, 347 U.S. 128, 140 (1954).

federally coerced testimony to convict a person of a crime in any court, state or federal is forbidden.[5] In Mr. Justice Black's opinion, the amendment not only prohibited federal agents from compelling a person to be a witness against himself; it also foreclosed federal court use of compelled testimony, no matter the "sovereign"--federal or state-which compelled it. For otherwise, the constitutional mandate against self-incrimination would be an illusionary safeguard collapsing whenever a confession was extorted by anyone other than the Federal government[6].

Although federally coerced confessions were inadmissible in federal court, the same could not be said if state actors committed the violation and the federal government sought to profit by using that evidence in federal court. In fact, Mr. Justice Black's opinion highlighted a concern, and raised the question whether interpretation of the Fifth Amendment and exclusion of evidence thereunder depended upon which sovereign, state or federal, committed the violation.

Arguably, the answer to that question would have been a resounding "no." Such response seems consistent with the Court's result in Rochin v. California,[7] a state criminal conviction reversed on the basis of the Fourteenth Amendment Due Process Clause. Addressing the defendant's Fifth Amendment challenge via the Fourteenth Amendment, the Court held there was no valid ground for distinction between a verbal confession extracted by physical coercion and one wrested from the defendant's body by physical abuse.[8] The Court obviously saw no difference between the protections of the Fourth

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[5] *Irvine*, 347 U.S. at 141 (1954).

[6] *Id.*

[7] 342 U.S. 165 (1952).

[8] *Rochin*, 342 U.S at 167 (1952).

and Fifth Amendments in this criminal case,[9] thus exclusion of illegally obtained evidence was mandated.

A related Fifth Amendment issue arises given a situation involving a federal supervisor who compels a federal employee's confession to marijuana use. If the employee committed the crime during lunch while offsite and a confession was wrested upon threat of loss of employment, would it be suppressed in a federal removal proceeding? Regardless of the outcome on a possible suppression motion, would the by-now "former" employee have a civil remedy for violation of his Fifth Amendment rights?[10] The answers to these questions are not always crystal clear for federal and state public employees.

The Supreme Court has decided three relevant cases involving Fifth Amendment rights of public employees. In Garrity v. New Jersey,[11] the Court held police officer statements, compelled under threat of termination of employment, about misconduct on the job could not be used against them in subsequent criminal proceedings. Although protected from criminal prosecution, the officers nevertheless could be penalized since their statements could be used in removal proceedings.

In Gardner v. Broderick[12] and Uniformed Sanitation Men Association v. Commissioner of Sanitation,[13] the Court was faced with a different scenario. In both

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[9] The Court held due process of law, as a historic and generative principle, precluded defining and confining standards of conduct more precisely than to say the conviction in the instant case could not be brought about by methods offending "a sense of justice."

[10] Practitioner should note consistent with interpretation of *Unitd States v. Janis, supra,* a judicial determination excluding evidence in a criminal proceeding would not be binding on an administrative agency's determination concerning exclusion of the evidence.

[11] 385 U.S. 493 (1967).

[12] 392 U.S. 273 (1968).

cases, public employees interrogated about job misconduct, who refused to surrender their Fifth Amendment rights, were fired. Seeking a balance between the government's right as employer to control and manage its business, including inquiry into on-the-job misconduct, versus an employee's Fifth Amendment rights, the Court held employees could not constitutionally be given the "Hobson's choice between self-incrimination and forfeiting their means of livelihood."[14] Accordingly, the Court directed the employees be reinstated.

A governmental employer is not wholly barred from insisting relevant information be given it; as the public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case.[15] Thus, the employer's violation in *Gardner* occurred not when the employer compelled the employee to answer job-related questions, but "when the employee was required to waive his privilege against self-incrimination."[16] This language suggests forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege.[17]

These cases indicate the employee in the above hypothetical would lose an administrative suppression motion in an employment proceeding as the facts do not

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[13] 392 U.S. 280 (1968).

[14] *Gardner,* 392 U.S. at 278 (1968).

[15] *Id.*; *Uniformed Sanitation,* 392 U.S at 283 (1968).

[16] *Id.*

[17] *See e.g.* Hester v. Milledgeville, 777 F. 2d 1492 (11th Cir.1985); Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982); Wiley v. Mayor and City Council of Baltimore, 63 LW 2549, (1995).

evidence he was required or compelled to waive his Fifth Amendment right. In such case, however, the employee would be protected from criminal prosecution consistent with *Garrity*.

The viability of the Fifth Amendment in federal employment law proceedings is demonstrated in Sternberg v. Department of Defense,[18] a case involving an employee's failure to cooperate in a job-related investigation. The Board affirmed a Fifth Amendment defense when the employee refused to answer questions dealing with threats, appearing in public undressed, and improperly entering a military facility, finding answers to those questions could reasonably be expected to involve criminal charges. This finding is especially curious inasmuch as it appears *Garrity* would have provided self-executing immunity from criminal prosecution. Since the Board inexplicably failed to follow *Garrity*, one is left to wonder whether this result was simply peculiar to that particular administrative judge and Board? Would a similar result be reached if a federal employee, charged with assaulting a fellow employee at the worksite, thereafter refused to cooperate in the agency's investigation asserting his Fifth Amendment privilege because of fear of prosecution by local or federal authorities? Considering *Sternberg* it should be!

In a case demonstrating the ebb-and-flow nature of Supreme Court constitutional interpretation, it was held the Fifth Amendment's privilege against self-incrimination applied to the states, Malloy v. Hogan,[19] overruling Twining v. New Jersey.[20] As a result, the Fifth Amendment now not only affords individuals with a constitutional right,

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[18] 41 M.S.P.R. 46 (1989).

[19] 378 U.S. 1 (1964).

[20] 211 U.S. 78 (1908).

it provides an unqualified remedy for its violation, exclusion of the evidence. Let us examine whether the Fourth Amendment affords individuals similar protection.

III. FOURTH AMENDMENT--HISTORICAL BACKGROUND

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As with the Fifth Amendment, these words seem clear and unequivocal, yet that view could not be further from the truth. We will attempt to understand the Fourth Amendment's interpretation and the oft-times varying application of the judicially created exclusionary rule, in state and federal court, with special emphasis on the rule's application in federal employment cases before the Board.

The various ways by which the Fourth Amendment's prohibition against unreasonable searches and seizures can be violated are innumerable, filling thousands of legal opinions. Nonetheless, analysis of a violation essentially remains unchanged, beginning with an assessment of the operative facts and circumstances, followed by a determination whether there was a violation under the circumstances. As with any legal analysis, we start by defining the terms "search and seizure" under the Fourth Amendment.

A "search" may have many different meanings depending of its context, however, for our purposes, "it implies prying into hidden places for that which is concealed and that the object searched for had been hidden or intentionally put out of way; merely looking at that which is open to view is not a search."[21] As to "seizure" it has been held an individual is seized by the police only if, under the circumstances, "a reasonable person

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[21] People v. Harris, 256 C.A. 2d 455, 63 Cal. Rptr. 849, 852 .

would have believed that he was not free to leave."[22] In other words, a seizure occurs only when a reasonable person would feel restrained by physical force or a show of authority. This concept relates to employment law inasmuch as it is normally occurs when coworkers or a supervisor seize an employee's personal property for subsequent evidentiary use. Both the authority of the person taking the property and the actual taking are factors a court or administrative agency should consider in determining if a seizure occurred.[23] Having defined these terms, let's examine their application in criminal law.

One of the earliest and foremost authoritative Supreme Court decisions addressing the breath and scope of the Fifth and Fourth Amendments was Boyd v. United States,[24] a notable case providing an excellent historical overview of the framers' intent when drafting the provisions. Involving a revenue collectors' seizure and forfeiture of thirty five cases of plate glass, suspected of being illegally imported into the United States without proper duties, a district judge directed the claimant to produce an invoice for the property, the failure of which was deemed confessional to the District Attorney's charge. The defendant appealed, challenging the statute's constitutionality, since it compelled him to produce evidence to be used against him. The central issue was whether evidence obtained via compulsory production of a man's private papers, tantamount to a search and seizure, could be used in federal forfeiture proceeding?

In deciding this issue, initially the Court sought to ascertain the nature of the proceedings intended by the Fourth Amendment's terms "unreasonable searches and

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[22] Gardiner v. Incorporated Village of Endicott, 50 F.3d 151,155 (1995); Michigan v. Chesternut, 486 U.S. 567, 573, (1988).

[23] *Gardiner*, 50 F.3d at 155.

[24] 116 U.S. 616 (1886).

seizures." This was accomplished by recalling the recent history of the controversies on this subject, both in this country and in England. During the 1700's a practice existed where revenue officers were empowered with writs of assistance, enabling them, in their unfettered discretion, to search suspected places for smuggled goods. This practice was loudly denounced in England and by colonists, including John Adams[25] as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book" since it placed the liberty of every man in the hands of every petty officer."[26]

Noting the concerns of early American statesmen, Mr. Justice Bradley, writing for the Court, recounted Lord Camden's judgment in Entwick v. Carrington, 19 Howell's State Trials, 1029:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasions of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence..."[27]

Following review of renowned writings on searches and seizures, the Court deemed it necessary to balance the sovereign's collection of validly imposed revenues against the individual's right to not have his compelled testimony used to forfeit his property.

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[25] See Works of John Adams, vol. 2, Appendix A, 523-525; vol. 10, 183, 233, 244-256 (1761).

[26] *Boyd,* 116 U.S. at 625 (1886).

[27] *Boyd,* 116 U.S. at 630 (1886).

Condemning this practice, the Court concluded the Act in question, expressly excluding criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), did not relieve the proceeding of consideration of Fifth and Fourth Amendment prohibitions. The Court recognizing the intimate relation between the two amendments held:

> "[T]hey throw great light upon each other. For the "the unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[28]

Accordingly, the Court held:

> Suits for penalties and forfeitures incurred by commission of offenses against the law, are of a quasi-criminal nature, and within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and further that compulsory production of private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure--within the meaning of the Fourth Amendment.[29]

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[28] *Boyd*, 116 U.S. at 633 (1886).

[29] 116 U.S. at 635: Accord, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S 693 (1965), where the Court held forfeiture of defendant's vehicle, with an estimated value of $1000, was more of a penalty than the criminal conviction with a maximum fine of $500.

Boyd's principle preventing federal court use of illegally obtained evidence in civil forfeiture proceedings left open the question whether a comparable result could be attained in other federal proceedings. That answer was provided in another Supreme Court decision, Weeks v. United States[30] which made the rule application in federal criminal actions. In fashioning an appropriate remedy for a warrantless search by a United States Marshall of defendant's home, and seizure of letters and papers the government used to convict, the Court began its analysis noting the Fourth Amendment took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for a Bill of Rights. This secured to American people, among other things, safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under general warrants issued by authority of the Government, wherein there were invasions of the home and privacy of the citizens, and seizure of private papers in support of charges, real or imaginary.[31]

In extending the exclusionary rule to federal criminal cases, Mr. Justice Day, writing for the Court, eloquently summarized the rationale and import of the Fourth Amendment by stating:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often

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[30] 232 U.S. 383 (1914).

[31] *Weeks*, 232 U.S. at 390 (1914).

> obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which the people of all conditions have a right to appeal for the maintenance of such fundamental rights."[32]

The Court concluded the private papers and letters taken from defendant's home by an official of the United States acting under color of his office, absent a warrant or consent, violated constitutional rights, and use of this evidence was prejudicial error.[33]

Weeks' doctrine was limited to federal courts due to the Court's recognition of the existing federal system, wherein the administration of justice was predominantly committed to the care of the states.[34] Generally speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Article 1, section 10, clause 1, in the Constitution, prohibiting Bills of Attainder and ex post facto laws, and the Thirteenth and Fourteenth Amendments.[35] By restricting federal courts from using illegally obtained evidence, the Court endeavored to allow individual states the opportunity to consider *Weeks* and fashion their own evidentiary rules.

This approach proved unsuccessful, for the Court often had to revisit application of the exclusionary rule. There remained lingering questions, for example, whether the rule applied to prohibit federal court use of evidence seized by state agents [the Silver Platter doctrine], and whether states were obligated to follow *Weeks*.

Answers to these questions were not provided until Supreme Court decisions in 1960[36] and 1961.[37] These decisions closed gaps in the law which had permitted federal

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[32] *Weeks*, 232 U. S. at 392 (1914).

[33] *Weeks*, 232 U.S. at 398 (1914).

[34] *Rochin*, 342 U.S. 165 (1952).

[35] *Rochin*, 342 U.S. at 168 (1952).

[36] Elkins v. United States, 364 U.S. 206 (1960), dismantled the Silver Platter doctrine,

authorities to profit from illegal acts committed by state agents, and where the States, having no judicially mandated controls, were free to engage in unconstitutional searches.[38]

One especially egregious state criminal case demonstrating state treatment of search and seizure violations, as well as the ebb-and-flow nature of Fourth Amendment constitutional analyses by the Supreme Court was Rochin v. California.[39] Feeling compelled, the Court reversed this conviction which had been sustained through the state's appellate process, under the Fourteenth Amendment Due Process Clause."[40]

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which permitted federal courts to use evidence unconstitutionally seized by state agents, a result of the Court's decision in *Weeks*. The doctrine allowed federal agents to be circuitous and ingenious in evidence gathering, if they so desired, since it implicitly endorsed constitutional violations by state agents procuring evidence for use in federal course, particularly since state agents were not subject to federal judicial control.

[37] Mapp v. Ohio, 367 U.S. 643 (1961) expressly overruling Wolf v. Colorado, 338 U.S. 25, (1949) which had declined to extend the exclusionary rule to the states under the Fourteenth Amendment Due Process Clause of the United States Constitution.

[38] *See,e.g.*. Wolf v. Colorado, *supra*, where the Court held in a state court prosecution for a state crime, the Fourteenth Amendment did not forbid the admission of evidence seized by state agents via an unreasonable search and seizure. Accord, *Irvine, supra,* where the Court refused to reverse a state criminal conviction where evidence was adduced via an illegal entry into defendant's home by state agents.

[39] *Rochin,* 342 U.S. 165, 175 (1952)

[40] Id citing *Rochin v. California*, 101 Cal. App. 2d 140, 143, 225 P. 2d 1,3 (1951).the Court found the deputy sheriff's conduct the "shocked the conscience." The Court's finding was predicated on the lower court's ruling deputy sheriff's were guilty of unlawfully breaking and entering defendant's room, and were guilty of unlawfully assaulting and battering defendant while in the room and were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning defendant at the alleged [sic] hospital.

The controversy surrounding viability of the exclusionary rule, in both criminal and civil proceedings, exists because there are many, in and out of the legal profession, who believe the rule results in reversal of convictions, permitting the escape of those obviously guilty, much to the detriment of society. Added to that view, is a perception "rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will release the wrong-doing defendant."[41]

This view represents but one side of the equation, specifically, where defendants use the exclusionary rule as a sword to exclude relevant evidence. In fact, the Court recognized, "Our cases evidence the fact the federal rule of exclusion and our reversal of conviction for its violations are not sanctions which put an end to illegal search and seizure by federal officers....The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this Court, have repeatedly been constrained to enforce the rule after its violation."[42] As the Court itself noted, using the exclusionary rule in this manner has apparently done little to curb violations of Fourth Amendment rights by law enforcement.

Additionally, there are those who generally believe the purpose of the Fourth amendment is not to redress the injury to the privacy of the search victim for "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[43] Instead the rule's purpose is to deter future unlawful police conduct, thereby effectuating the Fourth Amendment's guarantee against unreasonable searches and

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[41] *Irvine, supra.*.

[42] Id.

[43] United States v. Calandra, 414 U.S 339, 347 (1974) citing *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

seizures.[44] Use of the exclusionary rule in this manner is seen as using it like a shield to protect the citizenry from police abuse of constitutional violations.

No matter how the exclusionary rule may be characterized, its application, if not perfect, accomplishes the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.[45] Evidencing the framers true intent on the Fourth Amendment, Mr. Justice Brennan referenced James Madison's address to the First Congress on June 8, 1789:

> " If they [The rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[46]

Can it be denied there is great public concern the government, with the aid of the judiciary via constitutional interpretation, has becomes a lawbreaker? Inevitably, this conclusion will breed contempt for law, inviting every man to become the law himself. Arguably, it is this very usurpation of individual constitutional guarantees by the

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[44] Id. The Court, after balancing the benefits of excluding evidence against the costs to society of not doing so, held the exclusionary rule did not apply to grand jury proceedings.

[45] *Calandra,* 414 U.S.at 357.

[46] *Calandra,* 414 U.S at 356-357 citing 1 Annals of Cong. 439 (1789): Mr Justice Brennan's opinion noted it was these considerations and not the exclusionary rule's possible deterrent effect which were uppermost in the minds of the framers.

executive and judicial branches which led to the recent outgrowth of armed militias and vigilante groups [47]

Piecemeal application of the exclusionary rule is unworkable! One need only consider Mr. Justice Holmes sentiments:

> "[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which evidence is to be obtained...We have to choose, and for my part I think it is less evil that some criminals should escape than that the Government should play an ignoble part."[48]

In summary, the aforementioned decisions not only reflect the tedious, sometimes troubled development of the exclusionary rule in criminal law, they also signify the interplay between the Fifth and Fourth Amendments. While the former is interpreted by state and federal courts as a direct command against the admission of compelled testimony, the latter involves a two step determination of whether there was a violation and whether the exclusionary rule should be applied to restrict use of the evidence. Even though this method works in criminal law, it is not followed by the Board. [49] In any event, although the judicially created exclusionary rule has undergone many challenges, applying to federal and state criminal proceedings, its continued viability remains

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[47] Note recent congressional hearings concernings various militia groups in the United states, and the joint raid by agents of the Federal Bureau of Investigation (FBI) and Bureau of Alcohol, Tobacco, and Firearms (ATF) at Waco, TX.

[48] Olmstead v. United States, 227 U.S. 438, 470 (1928).

[49] See e. g. Delk v. Department of the Interior, 57 M.S.P.R (1993).

unclear, primarily so because its deterrent effect remains uncertain[50] as does evidence showing application of the rule results in less commission of crime.

IV. ANALYSIS-U.S. v. JANIS and O'CONNOR v.ORTEGA

Further analysis of application of the exclusionary rule should begin with examination of two Supreme Court decisions, United States v. Janis,[51] and O'Connor v. Ortega.[52] In *Janis* the Court faced two issues, the second concerning the Fourth Amendment and application of the exclusionary rule to an Internal Revenue Service (IRS) assessment action. The case arose when a city police officer, acting pursuant to a search warrant, seized cash and wagering records from the defendant. These wagering records were later provided to the IRS for its use, however a subsequent state criminal proceeding quashed the warrant. The District Court granted defendant's motion to suppress the wagering records as a result of the defective warrant, the Court of Appeals affirmed, and certiorari was accepted. The Court, after reviewing the history of the Fourth and Fifth Amendments, noted the debate within the Court on the exclusionary rule has always been a warm one[53]. This debate continues unabated even today.

In determining whether to apply the exclusionary rule the Court weighed societal costs of excluding evidence against the deterrent effects, if any, upon the city police officers. There being little to no scientific data on the deterrent effects of the

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[50] There is disagreement as to the efficacy of the exclusionary rule, as noted in *Elkins, supra*, and Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L. Rev. (1970).

[51] *Janis*, 428 U.S. 433 (1976).

[52] *O'Connor*, 480 U.S. 709 (1987).

[53] 428 U.S. at 446 (1976).

exclusionary rule in civil proceedings,[54] the Court explained the rule had never been applied to exclude evidence from a civil proceeding, federal or state, in its complex and turbulent history.[55] Addressing the need for a deterrent sanction, the Court stated one must identify those to be deterred, the city police in this case,[56] and they are already "punished" by exclusion of the evidence in the state criminal trial [57] and the federal criminal trial. [58] Noting a dearth of studies showing the exclusionary rule compelled law enforcement compliance with constitutional mandates, and equally insufficient studies showing application of the exclusionary rule demonstrably lessened crime, the Court held "...the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cots to society of extending the rule to that situation."[59] Furthermore, the Court specifically declined to address application of the rule to intrasovereign violations.[60]

As already stated, one of the rationales for the Court's decision was its belief that there being two sovereigns involved, there was little deterrent value in suppressing the evidence. This rationale sounds strikingly like the law existing under the Silver Platter[61]

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[54] Id.

[55] 428 U.S. at 447 (1976).

[56] 428 U.S. at 448 (1976).

[57] Id.

[58] Id citing *Elkins v. United States, supra.*

[59] 428 U.S. at 454 (1976).

[60] 428 U.S. at 456 (1976).

[61] The court discarded the "silver platter" doctrine in *Elkins* holding evidence illegally seized by state officers cannot lawfully be introduced against a defendant in a federal criminal trial. Mr. Justice Stewart's opinion, 428 U.S. at 461, analogized the situation in *Elkins*, involving a federal criminal trial, to that found in *Janis*, involving a federal

doctrine. Consistent with my earlier position that piecemeal application of the exclusionary rule is unworkable, the analysis in *Janis* was clearly in error. This case warranted analysis comporting with *Elkins*[62] inasmuch as the violation was occasioned by state agents, and the federal government, a different sovereign, sought to profit from the violation by using the evidence. The *Elkins* approach was not to be, for the Court stated the prime, if not sole purpose of the exclusionary rule was to deter unlawful police conduct.[63]

While the exclusionary rule's deterrent value served one purpose, suppression in state and federal criminal trials, would not the officer be further deterred if his labor were completely fruitless? Secondly, I submit suppression complies with Fourth Amendment's mandate, the sentiments of noted Supreme Court justices,[64] and previous Court precedent.[65] Finally, exclusion of the evidence would place the government at the

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proceeding to determine liability under the federal wagering excise tax provisions.

[62] 428 U.S. at 461 (1976) citing *Elkins v. United States*, 364 U.S. 206 (1960).

[63] 428 U.S. at 446 (1976).

[64] Mr. Justice Day, Black, Mr. Justice Holmes, and Mr. Justice Stewart to name but a few.

[65] 428 U.S at 463 where Mr. Justice Stewart stated: To be sure, the *Elkins* case was a federal criminal proceeding and the present case [Janis] is civil in nature. But our prior decisions make it clear that this difference is irrelevant for Fourth Amendment exclusionary rule purposes where, as here, the civil proceeding serves as an adjunct to the enforcement of criminal law. *See, e.g. Plymouth Sedan*, 380 U.S. 693. The Court's failure to heed these precedents not only rips a hole in the fabric of the law but leads to a result that cannot even serve the valid argumenst of those who would eliminate the exclusionary rule entirely. For under the court's ruling, society must not only continue to pay the high cost of the exclusionary rule (by forgoing criminal convictions which can be obtained only on the basis of illegally seized evidence) but it must also forfeit the benefit for which it has paid so dearly.

forefront, leading by example in upholding the law, not condoning or sanctioning illegal acts.

If the objective of the exclusionary rule is to deter unlawful police conduct, can the judiciary afford to equivocate by sending mixed signals to law enforcement that certain abuses are acceptable, as in not applying the exclusionary rule uniformly. If the court's role is to safeguard the rights of the people, does the court not abdicate that responsibility when it allows illegally seized evidence to be used as was done in this case? If the illegal acts of government agents are perceived as sanctioned by the courts, who in society is to say we are not that much closer to "Big Brother" of George Orwell's classic "1984?" Should the Court's decision be interpreted to suggest only in cases of intersovereign Fourth Amendment violations should the exclusionary rule not apply? Concerning federal employment proceedings, a different type of civil proceeding, where is the line to be drawn, if at all, in determining when not to extend the exclusionary rule? These thought provoking questions are very real concerns, and as we shall see later, provide valid argument supporting extension of the exclusionary rule to federal employment law proceedings before the Board.

Some guiding principles concerning workplace searches by supervisors were provided in *O'Connor*, a 1987 plurality decision. The case involved a seizure of material from a public employee's office, desk, and files by his supervisor while the employee was on administrative leave due to investigation of him for work-related misconduct. The seized items, later used in administrative proceedings resulting in the employee's discharge, were challenged under the Fourth Amendment as an unreasonable search and seizure inconsistent with the employee's expectation of privacy in the workplace.

Facing an issue of first impression, the scope of the Fourth Amendment in a noninvestigatory work-related intrusion and an investigatory search for evidence of work-related employee misfeasance by non-law enforcement personnel, the Court's analysis began by ascertaining the strictures of the Fourth Amendment, applied to the states via

the Fourteenth Amendment. The Court considered past precedent[66] and stated it would be anomalous to say the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. Thus, searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment.[67]

The Court continued its analysis by defining the boundaries of the workplace which it deemed to be those areas and items that are related to work and are generally within the employer's control.[68] Recognizing the boundaries of a workplace are fluid, often influenced by the particulars of the job, the Court believed any standard should be flexible, determined by a court on a case-by case basis. Consistent with that view, the Court noted not everything passing through the confines of a business address can be considered part of the workplace.[69] For example, employees bringing bag lunches or closed luggage to the office in preparation for a trip, would enjoy an expectation of privacy in those items and an appropriate standard for workplace searches would not necessarily apply. The Court, with five members agreeing, found Dr. Ortega enjoyed an expectation of privacy in his office.[70] Additionally, the Court held in determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends

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[66] New Jersey v. T.L.O., 469 U.S.325 (1985), holding the Fourth Amendment applied to school officials, and building inspectors, Camera v. Municpal Court, 387 U.S. at 523 (1967), and Occupational Safety and Health inspectors; Marshall v. Barlow, 436 U.S. at 307 (1978).

[67] 480 U.S. at 715 (1987).

[68] *Id.*

[69] 480 U.S. at 716 (1987).

[70] 480 U.S. at 718 (1987).

upon the context within which the search takes place, and requires a balance of the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace.[71]

Having found Dr. Ortega had an expectation of privacy did not end the inquiry, for the Court next employed a balancing test as it pertained to the employer's right to control the workplace and the employee's expectation of privacy within the workplace, if any. Therefore, it was necessary to determine if the search and seizure of Dr. Ortega's private property was unreasonable. Not surprisingly, the Court found little caselaw on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets.[72] Recognizing the significance of two competing interests, an employee's expectation of privacy in the workplace based upon societal expectations having deep roots in the history of the Fourth Amendment, counterbalanced against the realities of the workplace and the employer's right to run his business, it was held the Fourth Amendment's warrant requirement would be unduly burdensome.[73] As rational, the Court noted police and administrative enforcement personnel conduct searches primarily to obtain evidence for use in criminal or other enforcement proceeding, whereas employers and supervisors are "...hardly in the business of investigating the violation of criminal laws,"[74] and "...most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct."[75]

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[71] *Id.*

[72] 480 U.S. at 720 (1987).

[73] 480 U.S. at 722 (1987).

[74] 480 U.S. at 724 (1987).

[75] 480 U.S. at 721 (1987).

Understanding the great variety of work environs in the public sector, the Court held

> "...that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all circumstances. Under this reasonableness standard, the inception and the scope of the intrusion must be reasonable..."[76]

Not surprisingly, the Supreme Court's decision in *Janis* not extending the exclusionary rule to civil proceedings was not referenced or commented upon in the *O'Connor* decision. I submit this is so because the two cases are factually different, but more important, *O'Connor* set forth law to determine if a Fourth Amendment workplace violation occurred, while *Janis* went the next step, determining whether the exclusionary rule should apply.

In any event what is perplexing about *O'Connor*, is the Court's focus on whether the search was investigatory in nature or a routine inventory as employing agency contended. Was the Court concerned the supervisor's search for evidence warranting removal was analogous to police efforts to find evidence to convict. Unfortunately, the Court's opinion provides no explanation. Nonetheless, it appears the distinction is irrelevant under *Janis* since the evidence would be excluded in any event, there being no reason to deter the supervisor's conduct. On the other hand, considering *O'Connor* does not reference the deterrence value of the exclusionary rule, an argument may exists that *Janis* should not apply in federal employment cases where law enforcement personnel are not involved. This perception is not valid as the following cases demonstrate.

V. ANALYSIS-EXCLUSIONARY RULE USE IN MSPB CASES

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[76] 480 U.S. at 725-726.

Delk v. Department of the Interior[77] and Culley v. Defense Logistics Agency,[78] are two recent cases demonstrating the Board applies principles from *Janis*. *Delk* involved the seizure of items from the home of a United States Park Police (USPP) employee pursuant to a warrant executed by USPP law enforcement personnel. During the search, USPP officers seized items not listed in the warrant believing they were government property. These items were challenged in the removal proceeding, and before the Board as being the product of an illegal search and seizure.

Even though *O'Connor* had been decided, the Board reached its decision without analyzing whether the employee had a reasonable expectation of privacy in his home and its contents, nor ascertaining whether the search and seizure were reasonable in both its inception and scope. This may be due to the fact the wrongdoers were law enforcement personnel as was case in *Janis*. Although the Board did not disturb the administrative judge's determination officers seized some items during an unreasonable search, it was held the exclusionary rule was inapplicable because although the [Supreme] Court found the exclusionary rule likely to be most effective when applied to "intrasovereign" violations of the Fourth Amendment, such as the violation in this case, the USPP officers who expanded the search beyond the terms of the search warrant, the "offending officers" who are the objects of deterrence, were engaged in criminal investigation[79]....their "zone of primary interest...not investigation of employee malfeasance."[80]

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[77] 57 M.S.P.R 528 (1993)

[78] 60 M.S.P.R. 204 (1993)

[79] 57 M.S.P.R. at 531 (1993).

[80] Id; USPP attempted to use the evidence fin support of a criminal charge, however the United States Attorney declined to prosecute.

This language strongly suggest the Board focused upon the officer's primary duty of ferreting out criminal activity as opposed to employee malfeasance. The distinction is untenable reasoning since the investigation accomplished two tasks: securing evidence to prosecute the wrongdoer, at the sovereign's discretion, and securing evidence warranting removal of the responsible employee. The Boards view failed to fully appreciate this illogic characterization inasmuch as the employee's malfeasance could and did provide a basis for criminal allegations, the two being completely inseparable. In reality, aside from some purely non-criminal acts[81] warranting removal, the overwhelming majority could necessitate a search and seizure of evidence which falls within the purview of criminal activity as well. No matter how the investigation is characterized, its dual purpose cannot be doubted, and the Board erred when it failed to consider this factor in its determination.

That the violation was the result of action undertaken by "trained" law enforcement personnel is another factor the Board should have given greater weight to in its determination. This violation was quite unlike the one found in *O'Connor* where the wrongdoer was a supervisor, not skilled or trained in investigative techniques. Should that factual distinction make a difference in application of the rule? Yes when considered along with the intrasovereign nature of the violation, which, I submit, could be termed egregious for two reasons: these "trained" officers knew the law and its limit; yet they flagrantly exceeded that limit; and, furthermore, these officers had options upon discovering what they suspected was government property, either photograph the evidence or better yet, secure the area and obtain a broader search warrant. Albeit, these options are rendered with in hindsight, it should not be forgotten these were trained law enforcement personnel conducting the search.

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[81] For example, AWOL, leaving work early without authority, insubordination in deportment or language, etc.

Nevertheless if *Janis* was erroneously decided as contended above, then suppression of the evidence would have been appropriate to deter these officer. Failure to suppress the evidence, did not aid society in general, inasmuch as the failure to do so did little more than promote future overzealous behavior by these officers.

Apparently the Board did not share this view, for it held "...application of the exclusionary rule would not punish the USPP, nor significantly deter USPP officers from future unlawful conduct."[82] Furthermore, the board held:

> "As this case exemplifies, and the Supreme Court's failure to apply the rule beyond criminal cases demonstrates, the "marginal deterrence value" in suppressing the illegally seized evidence in the administrative proceedings is significantly less than is the case with respect to criminal cases, and the rule should not be applied in Board proceedings

In fact, the Board stated, it is cases involving government employees, where the primary purpose of the exclusionary rule, the deterrence of police misconduct, is not well served, and society's interest in maintaining levels of integrity and fitness of its public servants far outweigh any possible interest protected."[83] This language suggests public employee fitness and integrity, not to be confused with the integrity of government officials, outweighed individual Fourth Amendment interests. I submit that view is clearly not what the founding fathers intended.

Like *Delk* the Board in *Culley* addressed a Fourth Amendment challenge to evidence illegally obtained from an employee's home. This employee sought to have the Board revisit its precedent not extending the exclusionary rule to removal proceedings or, in the alternative, consider the violation as harmful error or a mitigating factor. Declining both alternatives, and providing a cursory explanation,[84]the Board adhered to *Delk.*

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[82] 57 M.S.P.R. at 531 (1993)

[83] 57 M.S.P.R. at 532 citing *Turner v. City of Lawton,* 733 P.2d 375, 383 (Okla. 1986).

[84] 60 M.S.P.R at 213 (1993).

Additionally, the Board found the "administrative judge properly declined to consider whether the search was valid under the Fourth Amendment, and admitted and considered evidence of the government property that the agency seized from her home."[85]

As is abundantly evident from above, the Board strictly applies *Janis* to federal removal actions, even if the Fourth Amendment violation was committed by law enforcement personnel and intrasovereign in nature. Undoubtedly, the Board would apply the same analysis where the violation was occasioned by non-law enforcement personnel (*O'Connor)* or intersovereign in nature (*Janis*). What better circumstances than those present in *Delk* and *Culley* warranting application of the exclusionary rule to MSPB removal proceedings?

I submit in addressing workplace searches and seizures, a much sounder test comporting with the Constitution, would require the Board to utilize two steps: apply *O'Connor's* test to determine if there was a constitutional violation of the employee's expectation of privacy, assuming there was such an expectation; secondly, ascertain the reasonableness of the search, both at its inception and in its scope. Upon finding an expectation of privacy which was violated, the Board would extend the exclusionary rule to its proceedings. Alternatively, and the Board in the second step could consider any violation a factor in mitigation, particularly if it was caused by law enforcement personnel or was egregious.

VI. ANALYSIS-EXCLUSIONARY RULE USE IN STATE CASES

In general, it is fair to say there is limited or no application of the exclusionary rule to civil proceedings in state courts. Lets first examine cases following the approach of

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[85] Id.

Janis, not extending the exclusionary rule to civil proceedings. In one such case where a government employee was terminated on the basis of evidence obtained in his supervisor's search of the employee's private briefcase, the state court of appeals ruled illegally obtained evidence need not to be excluded in the disciplinary proceeding before the State Personnel Board.[86] The court, prior to its ruling, noted the leading California case, Emslie v. State Bar,[87]holding albeit in dictum, the same policy consideration underlying the exclusionary rule should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property. Despite its dicta, the *Emslie* court concluded the exclusionary rule did not apply to attorney discipline proceedings.[88] Other courts[89] following *Emslie* have uniformly declined to apply the exclusionary rule in civil proceedings where the rule would not deter the unlawful search at issue.

Another state court decision in accord with *Finklestein* held evidence illegally seized was admissible in an administrative proceeding leading to disqualification of an unemployment compensation claim due to the employee's misconduct, theft from his employer.[90] The appeals court ruled the district court erred in finding the Fourth

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[86] Finkelstein v. State Personnel Board, 218 Cal. App. 3d 264, 267 Cal. Rptr. 133 (1990)

[87] 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991 (1974)

[88] Accord, Governing Board v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974) where the court held the exclusionary rule did not apply to teacher's subsequent disciplinary proceeding reasoning the officer would not be deterred by suppression because he would not have known of the subsequent disciplinary proceeding.

[89] *See, e.g.* In re Christopher B., 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978), no exclusionary rule in juvenile dependency proceedings; In re Robert P., 61 Cal. App. 3d 310, 132 Cal. Rptr 5 (1976), no exclusionary rule in high school discipinary proceedings.

[90] Lamartiniere v. Department of Employment Security, State of Louisiana and Union Carbide, 372 So. 2d 690 (1979)

Amendment to the United States Constitution and Article 1, section 5 of the Louisiana Constitution of 1974 prohibited admissibility of, or reference to, evidence obtained pursuant to a defective warrant. The appeals court reasoned excluding the evidence was not warranted in the unemployment compensation proceeding since the entire criminal law enforcement process had been frustrated by exclusion of the evidence in all criminal proceedings, and there would be no deterrent effect upon the law enforcement officers who acted in good faith reliance on a defective warrant.[91]

Although the above cases demonstrate how state courts apply the exclusionary rule in civil proceedings, not all proceedings were employment termination proceedings nor did the facts square with those found in *Delk*. Nonetheless, these cases reflect situations where the court found societal costs in applying the exclusionary rule outweighed the benefits to be gained, thus the rule was not extended. Additionally, it should be noted these decisions did not assess the "intrasovereign" nature of the violations (for which the state constitution may not have provided redress), nor how "egregious" were the violations under the circumstances.

Despite the dearth of significant state caselaw supporting extension of the exclusionary rule to employment termination proceedings, it behooves advocates practicing in this area to determine the nature of the civil proceeding involved, applicability of the exclusionary rule to civil proceedings generally within the state, and, if an employment proceeding, applicability of the rule to those proceedings. Additionally, it is important for advocates to realize some states apply the exclusionary rule to civil proceedings because of the State, not Federal, Constitution. Although both

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[91] A noteworthy case because the court's rationale for not extending the exclusionary rule to civil proceedings was the officer's "good faith" reliance upon the search warrant, unlike the situation in *Delk*. The Court's use of this doctrine may support argument not extending the exclusionary rule to civil proceedings where the officer's acted in "good faith."

Constitutions control the conduct of their respective sovereigns and agents, generally speaking the former is deemed to control state action, while the latter controls federal action. Since we have examined cases where the exclusionary rule was not extended, lets look at a situation where the rule was extended.

Supporting the thesis, one state court decision was found applying the exclusionary rule to an employment proceeding under state precedent and the State Constitution.[92] Faced with the question whether evidence, the product of an unlawful search and suppressed for criminal prosecution purposes, could be used in an administrative disciplinary proceeding, the court held the exclusionary rule applied to administrative as well as criminal proceedings, and the fruits of the illegal search would not be used to support imposition of civil penalties.[93]

Although this court recognized courts of other jurisdiction, particularly federal courts,[94] might decline to apply the exclusionary rule, it adhered to its state court of appeal's rationale applying the exclusionary rule to administrative proceedings:

> "To the extent that the State, or its agents, can bypass the deterrent effect of the exclusionary rule by using the fruits of an illegal search in a "civil" or "administrative" proceeding, the incentive for enforcement and investigative personnel to exceed constitutional limitations on their activity remains and the effectiveness of the rule as a deterrent is diminished."[95]

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[92] Matter of Boyd v. Constantine, Superintendent, New York State Police, 180 A.D. 2d 186, 586 N.Y.S. 2d 439 (1992).

[93] *See e.g.* People ex rel. Picarillo v. New York State Bd of Parole, 48 N.Y.S. 2d 76, 81-83, 421 N.Y.S. 2d 842, 397 N.E. 2d 354; People v. McGrath, 46 N.Y.2d 12, 21, 412 N.Y.S. 2d 801, 385 N.E. 2d 541, cert. denied 440 U.S.972 (1978).

[94] Burka, et. al. v. New York City Transit Authority, 747 F. Supp. 214 (S.D.N.Y.,1990).

[95] People ex. rel. Piccarillo v. New York Bd. of Parole, *supra*, at 81.

Boyd's court further explained the exclusionary rule was extended because it was reasoned the deterrent effect of the rule would be compromised if illegally obtained evidence could be used at an administrative hearing and extension emphasized predictability and precision in search and seizure cases.

Boyd's rationale for extending the exclusionary rule because it compels law enforcement to comply with constitutional limitations, thus providing predictability and precision under the Fourth Amendment, significantly compares with the opinions of several Supreme Court Justices, including that of Mr. Justice Stewart in *Janis.* Without reiterating the many views supporting uniform application of the rule, it seems beyond cavil that the exclusionary rule is a necessary and inherent constitutional ingredient of Fourth Amendment protection, without qualification by courts or boards seeking to determine the efficacy of the rule's deterrent effects. Simply put, as with the Fifth Amendment's direct command concerning use of self-incriminating testimony, this Constitutional protection cannot be so qualified.

Let's now examine what happens in federal court cases since we have examined how states apply the exclusionary rule in civil employment proceedings.

VII. ANALYSIS-EXCLUSIONARY RULE USE IN FEDERAL COURT CASES

Since the Supreme Court's decision in *O'Connor* there have been several cases demonstrating how federal courts would handle situations involving suppression of illegally obtained evidence in civil removal actions. In a recent decision, O'Brien v. South Suburban College, et.al.,[96] the district court denied the employer's motion for summary judgment on plaintiff's constitutional tort claim under 42 U.S.C. sect. 1983 for

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[96] Westlaw 376282 (N.D. Ill. 1994)

violating her Fourth Amendment rights. Plaintiff alleged her constitutional rights were violated when the defendant's library director searched and seized contents from her purse under coercion and duress. Ruling on the summary judgment motion, the court utilized *O'Connor's* tests to determine if the employee had a reasonable expectation of privacy, whether this expectation was reduced by operational realities or regulation,[97] and whether the search was reasonable in its inception and scope. As noted previously in section IV, this is but the first inquiry, determining if there was a constitutional violation, while the second step of my suggested approach would be extension of the rule to civil removal proceeding where the violation is egregious.

In this case, having found material issues of fact concerning search of the purse, an item of personal nature, which could not be said to be subject to random searches by the employer without some sort of prior notice to the employee that searches of personal property were part of the rules of the workplace, the court appropriately denied the motion for summary judgment. As this case obviously illustrates, an employee's constitutional expectation of privacy can be limited if the employee accepts a job where the employer has a rule or regulation concerning workplace searches.[98] Assuming a

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[97] See United States v. Bunkers, 521 F.2d 1217 (9th Cir) cert. denied, 23 U.S. 989 (1975) found no reasonable expectation of privacy in postal employee's locker because regulation allowed searches where there was reasonable cause to suspect criminal activity; and because the defendant had been fully advised of the regulation, the conditions placed use of the locker, and the government's right to search.

[98] *See e.g.* Brambrinck, et.al. v. City of Philadelphia, Westlaw 649342 (E.D.Pa.1994) the court found no consitituional violation where the employer had a regulation stating lockers were subject to random inspection, and there was reasonable suspicion of illegal drug possession warranting search of approximately 300 lockers and their content; American Postal Workers Union v. United States Postal Service, 871 F. 2d 556 (6th Cir.,1989) held postal workers who accepted assignment of lockers acknowledging in writing they were subject to inspection at any time by authorized personnel, and who were parties to a collective bargaining agreement giving the employer the right to inspect the lockers at any time and for any reason so long as a union steward was given the opportunity to be present, did not have a reasonable expectation of privacy in the lockers

search then occurs, it nevertheless be reasonable and in conformity with the employer's rule or regulation.

In another federal case where an employee challenged the employer's use of illegally obtained evidence used to effect the employee's termination, the district court [99] held the exclusionary rule applied to the civil removal action. Contesting the employer's use of a compelled urinalysis test which came back positive for marijuana and cocaine, the court found the employer lacked reasonable suspicion to direct the employee's submission to a urinalysis tests, and that the employer's regulation under which the urinalysis test was administered did not comply with the Supreme Court's decisions in Skinner v. Railway Labor Exec. Ass'n.,[100] and National Treasury Employees Union v. Von Raab.[101] Since the urinalysis test was illegally administered, its result was inadmissible as well.

Turning to the issue of suppressing those results, *Pike's* court noted *Janis*[102] left open the question whether the exclusionary rule applied in civil proceeding concerning intrasovereign Fourth Amendment violations. Feeling obligated under current Supreme Court and Tenth Circuit precedent,[103] the court felt bound to apply the exclusionary rule

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and expressly waived any Fourth Amendment rights in assigned lockers.

[99] Pike v. Gallagher, et.al., 829 F. Supp. 1254 (D.N.M.1993); Furthermore,this case, along with Shields v. Burge, 874 F.2d 1201 (7th Cir., 1988), Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 338 (1971) provide an excellent discussion of the issues typically found in claims under 42 U.S.C. sect. 1983, as well the complex issues concerning soveriegn and qualified immunity.

[100] 489 U.S. 602 (1989)

[101] 489 U.S. 656 (1989)

[102] *Janis*, 428 U.S. at 455 n. 31 (1976).

[103] Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir., 1979) held the exclusionary rule applied to an administrative hearing under the Ocupational Safety and Health Act (OSHA) since proceeding were "quasi-criminal" in nature.

to the employment termination proceeding, if it could be characterized as "quasi-criminal"[104]and if invocation of the rule outweighed the costs to society. "Quasi-criminal" proceedings are defined generally as actions which provide for punishment but are civil rather than criminal in form. [105] The court found the employment termination proceeding was quasi-criminal in nature, and the need to deter unconstitutional random drug testing being self-evident, the likely deterrent effect of extending the exclusionary rule to the removal proceeding outweighed the costs to society of not doing so.

In a case similar to *Pike*, but not directly implicating application of the exclusionary rule to a removal proceeding, the United States Court of Appeals for the Ninth Circuit recently held the discharge of a police officer for refusing to submit to a suspicion-based drug test violated his Fourth Amendment right to be free from unreasonable searches, since the department had no evidence linking the officer to illegal drug use.[106] Despite being reinstated to his former position with backpay, via the arbitration process,[107] the court upheld an award of civil damages award since implementation of the city's official policy and custom of "obey now, grieve later" resulted in the constitutuional tort.[108]

Not all federal employment removal cases have been favorable to employees. Burka, et. al. v. New York City Transit Authority, et. al.[109] was an adverse decision to an employee challenge of urinalysis testing procedures the transit authority used. It was

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[104] *Janis*, 428 U.S. at 454 (1976).

[105] *Savina*, 594 F.2d at 1362, n. 6 (10th Cir., 1979)

[106] Jackson v. Gates, City of Los Angeles, 975 F. 2d 648 (9th Cir., 1992)

[107] 975 F.2d at 651 (1992).

[108] 975 F.2d at 654 (1992).

[109] Supra.

held that federal courts need not extend the exclusionary rule to civil disciplinary proceedings or other employment-related decision-making processes.

VII. ANALYSIS-EXCLUSIONARY RULE USE IN MISCELLANEOUS STATE AND FEDERAL CIVIL PROCEEDINGS

Prior to examining application of the exclusionary rule in miscellaneous state and federal civil proceedings in general, it may be wise to refresh our knowledge of *Janis*.. As already noted, *Janis* held the exclusionary rule did not prohibit the IRS from using evidence seized by state agents illegally in a civil tax assessment. Believing societal costs of excluding the evidence outweighed the likelihood of deterring the police officer's conduct,[110] The Court stated the exclusionary rule would not prohibit the use of this evidence in a civil proceeding by a sovereign which was not involved in violating the Constitution in obtaining the evidence.[111] Left unresolved by *Janis* was whether the exclusionary rule applied in a civil proceeding against intrasovereign Fourth Amendment violations.[112]

That question was answered in INS v. Lopez-Mendoza.[113] Applying the balancing tests of *Janis* and recognizing the deterrent effect of the exclusionary rule is greater in cases of intrasovereign violations, the Court felt there were many factors on the cost side

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[110] *Janis*, 428 U.S. at 454, citing United States v. Calandra, 414 U.S. 338 (1974)

[111] See also Anthony Guzzetta v. Commissioner of Internal Revenue, 78 T. C. 173 (1982), citing United States v. Janis, 428 U. S. 433 (1976) and overruling Suarez v. Commissioner, 58 T. C. 792 (1972) which had extended the exclusionary rule to Tax Court proceedings.

[112] *Janis*, 428 U.S. at 455, n.31.

[113] 468 U.S. 3479 (1984)

of the balance not present in *Janis.*[114] As a result, the exclusionary rule did not apply to intrasovereign violations by the Immigration and Naturalization Service, however, the Court left open the possibility the rule might apply in cases involving "egregious" violations of the Fourth Amendment or other liberties transgressing notions of fundamental fairness and undermining the probative value of the evidence obtained.[115]

The United States Court of Appeals for the Ninth Circuit's decision, Orhorhaghe v. INS,[116] answered that question.[117] Generally stating the exclusionary rule did not apply in deportation hearings, the court found where evidence is obtained through an egregious Fourth Amendment violation, it must be suppressed. Thus, the court had to first determine if there was a violation, and whether the agents committed the violation deliberately or by conduct a reasonable officer should have known would violate the Constitution.

The Court found three facts making it an egregious violation: the alien's "Nigerian-sounding name" was insufficient to justify his seizure or prompt the INS investigation; the agents unlawfully entered the alien's apartment absent consent or a warrant; and, the agents unlawfully searched and seized the alien's passport and expired B-2 tourist visa from his closed briefcase.

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[114] 468 U.S. at 3485, 3486 (1984): The Court considered the fact that regardless of how the arrest was effected, deportation was still possible from evidence not derived from the deportee's arrest, many deportees (97.5%) simply agreed to voluntary deportation without a formal hearing, and, most important, the INS had its own comprehensive scheme for deterring Fourth Amendment violations.

[115] 468 U.S at 3489, n. 5 citing *Rochin,* 342 U.S. 165, (1952).

[116] 38 F.3d 488 (9th Cir., 1994).

[117] Accord, Gonzalez-Rivera v. INS, 22 F. 3d 1441 (1993), where INS officers stopped deportee solely on basis of his "Hispanic" appearance, such stop was an egregious constitutional violation.

Other examples of the exclusionary rule's application to civil proceedings include: a decision of the United States Court of Appeals for the Eleventh Circuit Court of Appeals affirming the Occupational Safety and Health Review Commission 's (OSHRC) ruling the exclusionary rule applied to OSHA proceedings,[118] a Texas Court of Appeals decision applying the exclusionary rule to redress an intrasovereign violation where the state sought to use the evidence in a state tax proceeding,[119] a decision of the Supreme Court of Utah barring use of evidence in a state tax proceeding seized in an unconstitutional roadblock,[120] three state court cases applying the rule to exclude illegally obtained evidence in license suspension proceedings,[121] and, a United States District Court case applying the exclusionary rule to a juvenile delinquency hearing.[122]

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[118] Secretary of Labor v. Sarasota Concrete Co. and Occupational Safety and Health Review Commission, 693 F. 2d 1061 (11th Cir.,1982). Applying *Janis,* OSHRC explained OSHA had a centralized enforcement scheme concerning inspections which provided a ready mechanism for enforcement of Fourth Amendment rights since the Secretary enjoyed statutory authority to determine the manner in which inspections were conducted, and supervisory power over those performing inspections, thus introduction of the exclusionary rule would have an appreciable impact on OSHA actions. The Court also affirmed OSHRC's decision not to apply the "good faith" exception to the exclusionary rule. But see *Trinity Industries, Inc., v. OSHRC,* 16 F.3d 1455 (6th Cir.,1994) applying the "good faith" exception.

[119] Vara v. John Sharp, Comptroller of Public Accounts of the State of Texas, 880 S. W. 2d 844 (1993) where the court held Texas Controlled Substances Act prohibiting application of the exclusionary rule in a state tax proceeding violated the federal and state constitiution, and evidence obtained in the search of his car trunk was inadmissible under state constitution in tax proceeding.

[120] Sims v. Collection Division of the Utah State Tax Commission, 841 P. 2d 6 (1992); the court held evidence obtained in an unconsitutional roadblock resulting in search and seizure from car trunk was inadmissible in tax proceeding to impose pecuniary liability since the proceeding was "quasi-criminal" in nature.

[121] Whisenhunt v. Department of Public Safety, 746 P. 2d 1298; 1299-1300 (Alaska, 1987); Poole v. Motor Vehicles Division, 306 Or. 47, 755 P. 2d 701, 703 (Or.,1988); Taylor Bus Service v. Department of Motor Vehicles, 202 Cal Rptr. 433 (1984). *Cf. Gikas v. Zolin,* 6 Cal. 4th 841, 25 Cal. Rptr. 2d 500, 863 P.2d 745 (1993) not extending

Extension of the exclusionary rule to a wide ranging array of civil proceedings is poignantly demonstrated by the above decisions. Considering the breathe of these civil proceedings, as well as the diverse manner in which the exclusionary rule was applied on both state and federal level, these decisions lend themselves to assisting counsel argue pro and con reasons for extending the exclusionary rule beyond criminal law. Furthermore, these cases demonstrate various factors, such as deterrent value and primary zone of interests, to name but two, that courts and the Board use as a premise in reaching their decision.

VIII. PROPOSED APPLICATION OF EXCLUSIONARY RULE BY THE BOARD-THREE HYPOTHETICALS

Since we have examined application of the exclusionary rule in various federal and state civil proceedings, including two Board cases, let's examine three hypotheticals and ponder what the Board presently does consistent with *Delk* and what it would likely do using the proposed standard:

> Situation 1: Mary Ellen, a competitive service employee with 12 years service in Department of the Treasury, U.S. Mint, was on leave, when her supervisor, Mrs. Nebby, received an anonymous telephone tip that Mary Ellen was stealing specially prepared paper used in printing U. S. currency and that evidence was kept in her desk drawers. When questioned, the tipster was unable to furnish any details about Mary Ellen's physical features or the layout of her office. Mrs. Nebby, a former police officer with a Bachelors and Masters degree in criminal justice, had noticed Mary Ellen lately seemed to possess more cash and had recently purchased a new home and car, while at the same complaining to coworkers she never had any money. While Mary Ellen was on leave, Mrs. Nebby and two of

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the exclusionary rule to DMV proceedings.

[122] 801 F. Supp. 1562 (E.D. Texas, 1992)

> Mary Ellen's coworker searched her locked desk drawers. They did not have Mary Ellen's consent or a warrant and the agency had no regulation concerning workplace searches. Nothing was found in the desk drawer suggesting Mary Ellen was involved in theft from the mint, however several very, descriptive personal letters from her homosexual lover were found, along with files the agency had directed be destroyed two years previously. Notwithstanding Mary Ellen's motion to suppress, this evidence was admitted and considered in her removal action. How should the MSPB resolve her Fourth Amendment claim?

Under present Board precedent, and taking into consideration *O'Connor*, the Board would most likely assess whether the search and seizure was a work-related intrusion; whether Mary Ellen had an expectation of privacy in the desk drawers and its contents; and, whether the search was reasonable in its inception and scope. Assuming for the sake of argument, the Board affirmatively answered the first two questions, and found the search was not reasonable in its inception and scope, it would nevertheless rule suppression was unwarranted in light of *Janis* and *Delk*.

Using my suggested approach, the Board would not only conduct the *O'Connor* analysis to determine if a violation occurred, it would consider the creditability of the informant as it pertains to whether the search was work-related and whether the search was reasonable in its inception and scope. Assuming the Board found the search was not reasonable in its inception and scope, violating Mary Ellen's right, and an intrasoveriegn violation under *Lopez-Mendoza,* the next step would be a Board determination of whether the violation was egregious. On that issue, the Board would consider Mrs. Nebby's training, if any, provided by the agency as to circumstances under which a search should be conducted, along with her educational background and previous employment as a police officer. resolving that inquiry would assist the Board in determining whether it was reasonable for Mrs. Nebby to conduct a search for suspected evidence clearly constituting employee malfeasance and criminal activity absent a warrant. In that regard, it is my opinion, the Board should find an egregious violation as the creditability of the informant was suspect, the violation was intrasovereign, Mrs. Nebby's educational

background evidenced her knowledge and appreciation of constitutional limits she flagrantly disregarded, and the evidence sought pertained to both criminal activity and employee malfeasance, inseparable goals. Thus, although clearly not in Mrs. Nebby's zone of primary interests, suppression would be appropriate where she conducted herself in a manner analogous to law enforcement, for otherwise, Mary Ellen would merely have a right without a remedy.

> Situation 2: The U.S. Postal Service regulation authorizes appropriate supervisory personnel to conduct locker searches when there is reasonable cause to believe criminal activity is afoot. The postal service provides the lockers and in writing, informs employees of the regulation and the requirement to provide supervisors with the combination or an extra key to assigned lockers Finding marijuana atop a heating duct in the room where 100 lockers are located, drug dogs were called in and they later alerted on two lockers. Mr.Wannabee, a supervisor, then authorized a search of all lockers in the room, including the contents of the lockers. Cocaine was found in an envelope inside Mr.Noluck's locker and an M-16 assault rifle in Mr. Bogart's locker. Both challenged the search, however they were subsequently removed from employment based upon the evidence seized. What is the likely MSPB result?

Under present Board precedent, and taking into consideration *O'Connor*, the Board would most likely assess whether the searches and seizures were work-related intrusions; whether either employee had expectations of privacy in their assigned lockers and their contents; and, whether the searches were reasonable in inception and scope. Consistent with other federal cases addressing locker searches where the employer had a rule or regulation authorizing searches, I believe the Board would appropriately find neither employee enjoyed any expectation of privacy in their assigned lockers. Furthermore, I believe there was reasonable cause to search the lockers and their contents.[123] As a

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[123] *See e.g.* Brambrinck v. City of Philadelphia, Westlaw 649342 (E.D.Pa. 1994) and American Postal Workers Union v. United States Postal Service 871 F. 2d 556 (6th Cir., 1989).

result, a motion to suppress should appropriately be denied. The distinction between this hypothetical and the first is the employer's rule or regulation governing the area to be searched, and the circumstances under which a search could be conducted. Since the employees were on notice of the employer's right to inspect, they waived any expectation of privacy. Assuming a finding the employees enjoyed an expectation of privacy, there nonetheless was reasonable cause to conduct the inspection, including a search of the contents of the lockers as drug are frequently be hidden in other objects. Assuming for the sake of argument, reasonable cause to conduct the inspection was found lacking or the search was not confined to lockers, the Board might nevertheless rule suppression was unwarranted in light of *Janis* and *Delk*. In that eventuality, I would part company with the Board, for as recognized in *O'Connor*, simply being a government employee does not divest one of constitutional rights, and where the employer clearly lacked reasonable cause to conduct a search, such conduct constitutes an egregious violation by which the employer would be restricted from using the fruits of that search,[124] consistent with *Orhorhaghe*.

> Situation 3: Mr. Doesright, a federal security officer, was charged by the agency with illegal marijuana possession. This charge was prompted when drugs dogs, randomly prowling the area, alerted on his car, whereupon a search ensued, authorized by competent authority. At the time of the search, the car was parked on federal property. Mr. Doesright, challenged the charge contending the evidence seized belonged to his girlfriend, and unbeknown to him, it was in his car. The girlfriend and Mr. Doesright testified at his removal proceeding. 45 days later, that the marijuana belonged to her. Additionally, the girlfriend stated, following her successful rehabilitation, she forgot to discard or destroy the drug. The girlfriend, also a federal employee with no access to classified material nor in a sensitive position, was thereafter directed to submit to a urinalysis test. She refused and was removed. The charge against Mr.

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[124] *See e.g.* Bateman v. State of Florida, 513 So.2d 1101 (1987) where despite employer's regulation authorizing search upon reasonable cause, criminal court suppressed evidence finding employer lacked such cause.

Doesright was also sustained. What does the MSPB do concerning the two suppression motions?

Again, under present Board precedent, taking into consideration *O'Connor*, the Board would most likely assess whether the search and seizure of Mr. Doesright's car was a work-related intrusion; whether Mr. Doesright had an expectation of privacy in his car, and whether the search of the car was reasonable in its inception and scope. As to the girlfriend, the same inquiry would be accomplished, with particular significance being the question whether she enjoyed an expectation of privacy in her bodily fluids.

As to Mr. Doesright, the Board would probably find he had an expectation of privacy, however since there was reasonable cause to suspect criminal activity based upon the drug dogs alerting, search of car was warranted. As a result, there being no violation of his Fourth Amendment right, *Janis* is not implicated, and suppression of the evidence should be denied.

Concerning the girlfriend, the key issue for the Board would be if the direction to seize her bodily fluids via urinalysis was reasonable in its inception and scope. Resolving that issue would require the Board to adhere to *Skinner* and *Von Raab*, specifically, did the employer have reasonable suspicion to direct the urinalysis, since she obviously had an expectation of privacy in her bodily fluids consistent with *Pike*. Under these facts, I submit the employer like that in *Jackson* lacked reasonable suspicion to direct the urinalysis test inasmuch as more than 45 days had elapsed between discovery of the drug and her admission to its ownership, combined with the employer's absence of articulable facts indicating any current drug use. Lacking reasonable suspicion, the employee's refusal to comply with an the employer's unconstitutional directive should be excluded as was done in *Jackson*. Consistent with *Delk*, however, the Board would probably not exclude the evidence, a result I believe would be in error for reasons stated above.

IX.-CONCLUSION

In spite of its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, application of the rule has been restricted to areas where its remedial objectives are thought most efficaciously served.[125] This approach fails for it misses the point by linking the right to constitutional protection from unreasonable search and seizure to a judicially created test measuring the costs to society for deterrence of unlawful conduct against the benefits to be attained by not excluding evidence. That this quantifying test was not the framers intent is readily established in sections II and III depicting historical developments of the Fifth and Fourth Amendments.

The detail provided in those sections might, at first glance, not seem germane to analysis of the rule's extension to federal civil removal proceedings, but that view could not be further from the truth. Such detail not only demonstrates the interplay between the two amendments in the minds of the framer, but more important, it graphically illustrates the haphazard and tedious development of the exclusionary rule's application in criminal law over the past century. Cognizant the Supreme Court left unresolved the issue whether to apply the exclusionary rule in egregious intrasoveriegn cases, it is the rule's historical criminal law development, including the policy, doctrine, and rationale underpinning it, which are currently being considered, and in some cases, adopted by courts and the Board to determine the efficacy of the rule's use in civil proceedings.

Needless to say and as has been shown, application of the exclusionary rule in criminal law is entirely consistent with the framers' intent. However, lest we forget our history, we in America are doomed to repeat it, if it takes another one hundred years or so

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[125] *Calandra*, 414 U.S. at 348.

to realize extension of the exclusionary rule to civil proceedings is every bit as warranted as is done in criminal law.

The hypotheticals from above, as well as precedent from the Supreme Court, and various federal and state courts, doubtlessly show the Board's current approach to application of the exclusionary rule in federal removal proceedings is in error, for it only leaves federal employees a constitutional right without a remedy. A better Board approach, affording these individuals a right with a remedy, is demanded. In sum, that approach would utilize *O'Connor's* test to determine if there was a Fourth Amendment violation, in tandem with an *Orhorhaghe* standard, not only remedying "egregious" violations, but all of them.